In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1065

MICHAEL MYERSON, A/K/A MEYER MYERSOHN,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted after a trial by jury in the United States District Court for the Southern District of New York on a one-count indictment charging him with wilful tax evasion for the 1956 tax year. The proof at his trial showed that he had received $275,162.32 of adjusted gross income during 1956, resulting in taxable income of $271,762.32 and an income-tax liability of $198,508.46 (G.A. 139b, 149b–150b).[1] On his return for that year petitioner declared taxable income of $62,699.52 and a tax of $28,113.70. His sentence, as reduced in January 1967,

[1] "G.A." refers to the Government's Appendix in the court below.

was three years' imprisonment. The court of appeals affirmed the conviction *per curiam*. 368 F. 2d 393. The judgment of the court of appeals was entered on November 16, 1966 (Pet. 2, 25). The petition for a writ of certiorari was filed on February 14, 1967, well after the expiration of the 30-day period prescribed by Rule 22(2) of the Revised Rules of this Court, and it is, therefore, untimely. In any event, there is no occasion for further review by this Court.

1. There is no merit to petitioner's contention that his indictment was returned after the limitations period had expired. Section 6531 of the Code provides a six-year limitations period but prescribes that the time during which the defendant "is outside the United States or is a fugitive from justice" shall "not be taken as any part of the time limited by law for the commencement of such proceedings" (Pet. 24). Petitioner was indicted on August 8, 1963, which was 115 days after April 15, 1963—the date on which the statute of limitations would have run if no exception had been applicable. It was shown, however, that petitioner had been in Canada for more than 115 days during the six-year period (G.A. 128b–129b), and the jury was instructed to return a verdict of not guilty unless it found that petitioner had been outside the United States for more than this time. The jury's verdict indicated that it found that the statute had been tolled, and that the indictment was not barred by the statute.

Section 6531 of the 1954 Code was intended to do away with the uncertainties surrounding its predeces-

sor, Section 3748(a) of the 1939 Code, which gave rise to substantial litigation. The present provision is clear-cut and provides an easily administered limitations provision. See *United States* v. *Foster,* 197 F. Supp. 387, 394 (D. Md.), reversed on other grounds, 309 F. 2d 8 (C.A. 4). It was reasonable for Congress to relieve the prosecution of the burden of proving in such cases the purpose of the taxpayer's stay in a foreign country.

2. Nor is there substance to petitioner's claim (Pet. 15–17) that he may have been prejudiced by the circumstances under which the jury deliberated—during the famous "black-out" of electrical power which afflicted the northeastern part of the country on November 9, 1965, the last day of the trial. That contention was plainly waived at trial. Before the verdict was returned, the trial court summarized the relevant events for the record in the presence of counsel. He stated that "with the consent of counsel and at the suggestion of the jury they resumed their deliberations [at approximately 10:45 p.m.] and certain exhibits, agreed upon by counsel, were sent to the jury room * * *" (G.A. 154b). Although the court asked petitioner's attorney whether he had anything to "add or correct or suggest" (G.A. 153b), defense counsel neither objected to the court's reference to his consent nor made any additional statement.

Moreover, petitioner's argument is premised upon the erroneous assumption that there was no auxiliary source of light available and that the deliberations were conducted in utter darkness. It is obvious from the fact that the jurors wrote three notes to the court

after the black-out began (G.A. 153b), and from the court's recitation that they were furnished with certain exhibits, that there was sufficient light by which to read and write. Indeed, it is clear from the judge's statement that the jury was given the option of suspending its deliberations and that it chose instead to continue. In these circumstances there is no reason to believe that the jurors were unable to render a fair verdict.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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